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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

MARIA PIROGLU,

PETITIONER,

v.

T.R.COLEMAN, ET AL.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a public employer's unconstitutional search of a public employee, which yields the sole grounds for the employee's termination, the cause of the termination for purposes of assessing damages and granting other relief under 42 U.S.C. section 1983?

2. Is suspicionless compulsion of a public employee's urination for testing unreasonable when urinalysis is neither authorized by a warrant nor by written regulations or policies that eliminate discretion over whom to test, when to test, and for what to test?

PARTIES TO THE PROCEEDINGS BELOW

The sole Plaintiff in the District Court was Maria Piroglu. The Defendants were T.R. Coleman, individually and as Fire Chief of the District of Columbia; Roger Hooper, individually and as Lead Inspector of the District of Columbia Fire Department; Nora Coxeum, individually and as a Sergeant in the District of Columbia Police Department; and the District of Columbia. Plaintiff was the Appellant in the Court of Appeals and all the Defendants were Appellees.

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Petitioner Maria Piroglu petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS IN THIS CASE

The United States District Court for the District of Columbia denied Plaintiff's and granted Defendants' motion for summary judgment on April 29, 1992, 32-37A, and denied Plaintiff's motion for reconsideration on July 17, 1992. 38-41A. The United States Court of Appeals for the District of Columbia Circuit reversed in part and affirmed in part on June 17, 1994. 1-31A. The decision is reported at 25 F.3d 1098 (D.C.Cir. 1994). The Court denied Plaintiff's motion for rehearing on August 3, 1994. 42-43A.

JURISDICTIONAL GROUNDS

The Court of Appeals entered its

judgment on June 17, 1994 and denied Plaintiff's motion for rehearing on August 3, 1994. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. section 1254(1).

PROVISIONS AT ISSUE

This case involves construction of the Fourth Amendment to the United States Constitution and 42 U.S.C. section 1983:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const., amend. 4.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. section 1983.

STATEMENT OF THE CASE

STATEMENT OF FACTS

Plaintiff Maria Piroglu was employed by the District of Columbia Fire Department as an Emergency Medical Technician. 3A. At the end of her initial training course, she and all others in the course were ordered by Defendant Lead Inspector Roger Hooper to provide a sample of their urine for analysis. 4A.

Defendant Hooper did not have any reason to believe that Plaintiff had used any controlled substance. 4A.[1] His order that Plaintiff submit to urinalysis was neither authorized by a warrant nor

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[1]. She had produced a urine sample prior to beginning employment and it had tested negative. Joint App. 56.

by any written regulations or policies of the District of Columbia or its Fire Department. 16A n.2. In fact, his order was inconsistent with the Department's written drug testing policy, which authorized testing only based on reasonable suspicion of impairment. 16A n.2.

Pursuant to Defendant Hooper's order, Plaintiff was transported to a District clinic for testing. At the clinic, Defendant Police Sergeant Nora Coxeum observed Plaintiff as she produced a urine sample. Joint App. 24, 32. This was in accordance with clinic policy that required observation of "the urine as it passes from the individual into the . . . bottle." Joint App. 104. Despite the fact that she had just observed Plaintiff urinate into the bottle, Coxeum then ordered Plaintiff to produce another sample on the grounds that the first

sample felt cold to the touch. 5A. Coxeum and another District agent then both observed Plaintiff as she produced the second sample. 5A.

Plaintiff's employment was terminated based solely on the results of the analysis of her urine. 6A.

STATEMENT OF PROCEEDINGS BELOW

Plaintiff filed an action in the District Court alleging, **inter alia**, a violation of her Fourth Amendment rights. The District Court held that this Court's decisions in **Skinner v. Railway Labor Executives' Ass'n**, 489 U.S. 602 (1989), and **National Treasury Employees' Union v. Von Raab**, 489 U.S. 656 (1989), precluded any challenge to the drug testing of public safety personnel. 34-35A. Plaintiff moved for reconsideration based on the District Court's failure to cite a controlling Court of Appeals' decision in **National Treasury Employees' Union v.**

Yeutter, 918 F.2d 968 (D.C.Cir. 1990). In **Yeutter**, the Court of Appeals held that observation of the production of a sample without suspicion of tampering rendered drug testing unreasonable. The District Court denied the motion on the grounds that: (1) **Yeutter** did not apply "retroactively," (2) **Yeutter** did not establish an "'exclusionary rule' prohibiting the use of positive test results in employment decisions," (3) **Yeutter** permitted observation when there is individualized suspicion of tampering, and (4) even if the testing had been unconstitutional, Plaintiff would only have been entitled to damages for the invasion of her privacy, for which she did not pray. 39-40A.

The Court of Appeals reversed in part and affirmed in part. The Court held that: (1) **Yeutter** did apply to this case, (2) there was no suspicion of

tampering when Plaintiff produced the first sample, and (3) Plaintiff did pray for damages based on the invasion of her privacy. 11-15A. The Court of Appeals remanded the case to the District Court[2] to: (1) determine whether Plaintiff was fully observed as she gave the first sample[3] and (2) decide whether the

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[2]. The fact that the Court of Appeals remanded this case is not a bar to review by this Court. See 29 U.S.C. section 1254(1). The two questions raised in this Petition have been fully and finally adjudicated by the lower courts.

[3]. The Court found, "The record does not resolve the parties' dispute regarding whether Coxeum had Piroglu in plain sight as Piroglu urinated . . . . For example, the record does not foreclose the possibility that Piroglu was in a stall when she urinated and Coxeum merely observed her feet under the door." 10A. Plaintiff moved for rehearing on the grounds that there was no genuine issue concerning this fact because Defendants (1) admitted in their answer that "Defendant Coxeum observed Plaintiff Piroglu as she urinated into a bottle," Joint App. 24, 32, and (2) did not contest the facts set forth in Plaintiff's Statement of Material Facts that (a) "In accordance with the Clinic policy, . . . Coxeum observed Plaintiff while she produced the sample" and (b) Clinic policy provided that "the official assigned to the collection area must observe the urine as it passes from the individual into the Nalgene specimen bottle."

presence of two observers during production of the second sample rendered the search unreasonable.

The Court of Appeals went on, however, to reject Plaintiff's argument, not addressed by the District Court, that the absence of any written regulation or policy authorizing the search rendered it unreasonable. The Court of Appeals reasoned that in **Skinner** this Court "did not hold that urinalysis constitutes an unreasonable search if conducted in the absence of regulations. Rather, it held that, when weighing an employee's privacy interest against an employer's interest in random drug testing, the existence of specific authorizing regulations decreases the employee's privacy interest." 21A. Moreover, the Court found that the District had a "practice"

Joint App. 37-38. Plaintiff does not, however, seek review of this issue by this Court.

of testing trainees immediately prior to the completion of their training and that this "practice restricted its discretion to order drug testing." 23A.

The Court of Appeals also affirmed the District Court's holding that even if (1) the search was unconstitutional and (2) Plaintiff's employment was terminated based solely on the results of the search, she would still not be entitled to reinstatement or damages for lost wages. The Court reasoned that "the constitutional violation did not cause Piroglu's discharge. **See Carey v. Piphus**, 435 U.S. 247, 254-59 (1978). The District terminated Piroglu's employment because she tested positive for cocaine use irrespective of any constitutional infirmity in the collection process."

14-15A.[4]

BASIS FOR FEDERAL JURISDICTION

The District Court had jurisdiction over this case pursuant to 28 U.S.C. section 1331 and 1343.

ARGUMENT

The Court of Appeals decided important questions of federal law which have not been, but should be, definitely settled by this Court, and decided them in a way that conflicts with applicable decisions of this Court. In two respects, the Court of Appeals' decision grants less protection to the privacy of ordinary citizens, who are not suspected of any crime, than is accorded to that of criminal defendants. First, the Court imposes a heavier burden of proving

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4. Neither of the lower courts held that Plaintiff could be denied reinstatement on equitable grounds. Both held as a matter of law that the search was not the cause of the termination.

causation on plaintiffs seeking damages for violation of their Fourth Amendment rights than is imposed on criminal defendants seeking to suppress evidence. Second, while this Court has protected the privacy of all citizens against arbitrary invasion by requiring that a search be pursuant either to a warrant or administrative regulations that confine the discretion of officers in the field, the Court of Appeals upheld the urinalysis of the Plaintiff in the absence of both safeguards.

I. REVIEW IS NECESSARY TO ESTABLISH A RULE OF CAUSATION IN FOURTH AMENDMENT DAMAGE ACTIONS

The question of how lower courts should determine what injuries are caused by a violation of the Fourth Amendment is important for three reasons. First, this Court has not directly ruled on the question. This Court has addressed the substantive protections afforded by the

Fourth Amendment against various types of administrative searches, including those of public employees. See **Skinner; Von Raab; O'Connor v. Ortega**, 480 U.S. 709 (1987). This Court has also addressed the question of causation under both the due process clause of the Fourteenth Amendment and the First Amendment. **See Carey; Mt. Healthy City School District v. Doyle**, 429 U.S. 274 (1977). But this Court has never addressed the question in a Fourth Amendment damage action.

Second, in establishing a rule of causation, the Court of Appeals seriously undercut the principle of compensation for all harm caused by a breach of duty which this Court has adopted as the first principle of remedies for constitutional torts.

Finally, the government is increasingly conditioning not only employment but other benefits on the

results of mandatory drug testing and other types of searches. The question of what remedies are available if such searches violate the restrictions of the Fourth Amendment is therefore likely to arise with increasing frequency in the future.

A. The Court of Appeals' Decision is Inconsistent with this Court's Holding Concerning Causation in First Amendment Damage Actions

This Court has held that damages should be awarded in constitutional tort cases that compensate the victim for all damages caused by the breach of duty. **Carey**, 435 U.S. at 255; **Bivens v. Six Unknown Federal Narcotics Agents**, 403 U.S. 388, 397 (1971). This Court's most thorough treatment of the question of causation in constitutional torts cases appears in the first amendment case of **Mt. Healthy City School District v. Doyle.**

In **Mt. Healthy**, this Court reviewed a school board's decision to deny tenure to a teacher based on both his protected expression to a radio station and other unprotected conduct. In language strikingly similar to that of the Court of Appeals in this case, the District Court had written, "there did exist in fact reason . . . independent of any First Amendment rights or exercise thereof, to not extend tenure." **Id.**, 429 U.S. at 285.[5] This Court separated the two possible meanings of this language. On the one hand, this Court explained that the District Court's statement might mean simply that because the teacher was not tenured, "Clearly the Board legally could have dismissed respondent had the

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[5]. In this case, the Court of Appeals reasoned, "The District terminated Piroglu's employment because she tested positive for cocaine use irrespective of any constitutional infirmity in the collection process." 14-15A.

radio station incident never come to its attention." **Id.** On the other hand, another "plausible meaning of the [district] court's statement is that the Board and the Superintendent not only could, but in fact would have reached that decision had not the constitutionally protected incident . . . occurred." **Id.** This Court adopted the second reading of the lower court's language as the rule in section 1983 cases. This Court imposed a burden on the public employer to show "that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." **Id.** at 287 (emphasis added).[6]

Defendants in this case did not carry and could not have carried the **Mt.**

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[6]. **Lower federal courts have correctly so construed Mt. Healthy. See, e.g., Lee v. Russell County Board of Education, 684 F.2d 769, 775 (11th Cir. 1982).**

Healthy burden of proving that they would have terminated Plaintiff's employment even in the absence of the unconstitutional search. Defendants admitted that the results of the search were the sole cause of the discharge. Defendants presented no evidence that a constitutional search would have been conducted at or near the time of the unconstitutional search, even if the latter had not occurred, and would have produced the same evidence. Defendants could not possibly have presented such evidence because their policy required the very observation that rendered the search unconstitutional.

B. The Court of Appeals' Holding is Inconsistent with this Court's Holdings Concerning the Use of Unconstitutionally Seized Evidence in Criminal Proceedings

The rule of causation that this Court has instructed lower courts to apply in ruling on motions to suppress

evidence in criminal cases accords with **Mt. Healthy** and thus inconsistent with the Court of Appeals' holding.

In **Nix v. Williams**, 467 U.S. 431 (1984), this Court considered the admissibility of evidence concerning the location and condition of a body that police had located as a result of their unconstitutional interrogation of a suspect. The government argued that the evidence should nevertheless be admitted because the body would have been found regardless of the interrogation, in the course of a systematic search of the area that was already underway.

In evaluating the government's argument, this Court made clear, as it had in **Mt. Healthy**, that the relevant question was not whether the evidence could have been discovered, but rather whether it would have been discovered by lawful means. In order to rely on the

fruits of an unconstitutional search, the government must prove that the evidence "ultimately would have been discovered by lawful means." **Id.**, 467 U.S. at 444 (emphasis added). This Court did not allow the government to argue that the suspect would have led them to the body had a constitutional interrogation (or search) taken place, i.e. had the suspect's counsel been present. Rather, the prosecution must show that the evidence would have been discovered even if no interrogation (or search) had taken place.[7]

This Court has suggested that the test of causality should be the same in applying the exclusionary rule and assessing damages for constitutional torts. In fact, in **Mt. Healthy**, this

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[7]. Lower federal court have correctly so construed **Nix**. See, e.g., **United States v. Silvestri**, 787 F.2d 736, 744-46 (1st Cir. 1986).

Court looked to its analysis of causation in criminal cases applying the exclusionary rule for guidance. 429 U.S. at 286-87. In both contexts, the objective is to fully vindicate individuals' constitutional rights without placing them in a better position than they would have occupied absent the violation of their rights. This objective will not be accomplished if ordinary citizens are not able to collect damages based on the same showing of causation required of a criminal defendant in order to suppress incriminating evidence.

C. The Court of Appeals' Holding is Inconsistent with this Court's Holdings Concerning the Application of Ordinary Tort Law Principles in Constitutional Tort Cases

This Court has held that the answer to the question of what injuries are caused by a violation of constitutional rights "is ordinarily determined

according to principles derived from the common law of torts." **Memphis Community School District v. Stachura**, 477 U.S. 299, 306 (1986). Under tort law, a breach of duty must be both the "but for" and proximate cause of damage for the damage to be compensable.

In this case, the unconstitutional search was both the but for and proximate cause of the Plaintiff's termination. In the absence of the unconstitutional search, the Plaintiff would not have been fired. Thus there is no question of but for causation.

In contrast, in **Carey**, there was a genuine question of but for causation. In that procedural due process case, the deprivation was motivated by facts other than the lack of due process. Put in plain language, the lack of a hearing was

not the moving cause of the suspension.[8] Thus there was a genuine question of whether due process would have prevented the deprivation -- a question of but for causation. **Id.**, 435 U.S. at 260. But in this case, the unconstitutional search was clearly the moving cause of the discharge.

Nor is there any question of proximate causation in this case. Damage is proximately caused by a breach of duty if it can reasonably be foreseen that it will result from the breach. In **Monroe v. Pape**, 365 U.S. 167 (1961), this Court stated that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."

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[8]. In **Carey**, this Court noted with approval the Court of Appeals' reasoning that "the failure to accord procedural due process could not properly be viewed as the cause of the suspensions." **Id.** at 260.

Id. at 187. It was obviously reasonably foreseeable to Defendants when they ordered and conducted the search that it might lead to Plaintiff's termination. What other purpose could it serve? In fact, District policy required that positive test results be used to discipline employees. Joint App. 84.

The Court of Appeals' holding that "the constitutional violation did not cause Piroglu's discharge" is inconsistent with these ordinary principles of tort law. The Court of Appeals explained, "The District terminated Piroglu's employment because she tested positive for cocaine use irrespective of any constitutional infirmity in the collection process." 14-15A. While this statement is susceptible of two readings, the first is inconsistent with ordinary principles of proximate causation and the second with

ordinary principles of but for causation.

The Court of Appeals' decision may be read as limiting recoverable damages to those that are the direct or immediate result of an unconstitutional search. The Court suggests Plaintiff may be entitled to some form of damages -- perhaps pain and suffering resulting directly from the search. But the Court holds that Plaintiff's discharge was not caused by the search even though it was based solely on the results of an analysis of the fruits of the search. The concept of proximate cause, however, does not limit compensable damages to those that are the direct result of a breach of duty.

Alternatively, the Court of Appeals' decision may be read as imposing a burden on plaintiffs to show that they would not have been injured had a constitutional search occurred. Plaintiffs will only be

able to meet this burden if they can show that a constitutional search would not have produced the incriminating evidence or that no constitutional search could have been conducted. But for causation, in contrast, is ordinarily analyzed by asking whether the damage would have been sustained in the absence of the violation not whether the damage could have been sustained in the absence of the violation.

The Court of Appeals' departure from ordinary principles of tort law renders the prophylactic protections of the Fourth Amendment unenforceable in a damage action. Under either reading of the Court of Appeals' holding, a public employer could solicit the police to break into a public employee's house without a warrant and if the police seized evidence of job-related misconduct that led to the employee's termination,

he or she would not be entitled to reinstatement or backpay because either (1) the search was not the direct cause of the termination or (2) the evidence could have been seized even if the police had obtained a warrant.[9] The Court of Appeals' logic thus removes a large measure of the incentive for civil authorities to comply with the prophylactic requirements of the Fourth Amendment.

Review by this Court is necessary in order to establish that, if a public employer terminates an employee based solely on the fruits of the employer's unconstitutional search of the employee, the search is the cause of the discharge

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9. Under the Court of Appeals' holding, the employee could collect damages for that pain and suffering caused by the fact that the search was conducted without a warrant, but he or she would have to prove that these damages resulted only from the lack of a warrant and not from the search itself. This would be extremely difficult.

for the purpose of granting relief under section 1983.

II. REVIEW IS NECESSARY TO ESTABLISH THE RELATIONSHIP BETWEEN WRITTEN REGULATIONS OR POLICIES AUTHORIZING ROUTINE, ADMINISTRATIVE SEARCHES AND THE WARRANT REQUIREMENT

The Court of Appeals held that the government constitutionally may conduct routine, warrantless drug testing of government employees in the absence of any written regulations or policies specifying who can be tested, when, and for what. This is an important issue for two reasons. First, this Court has repeatedly held that searches that further legitimate governmental interests other than enforcement of criminal law are not **per se** unreasonable absent a warrant. **See, e.g., Skinner**, 489 U.S. at 623. Yet this Court has also made clear that the privacy of citizens not suspected of any crime is entitled to no less protection than that of criminal

suspects. **See Camara v. Municipal Court,** 387 U.S. 523, 530 (1969) ("It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.") It is therefore critical to establish safeguards alternative to, but no less effective than, a warrant requirement, against abuse of administrative searches.

Second, the number of such searches, of public employees and others, is increasing exponentially. Currently, the lower courts have only a vague reasonableness balancing test with which to evaluate such searches. A clear, simple standard for determining when such searches are reasonable is essential.

A. The Court of Appeals' Holding is Inconsistent with this Court's Holdings that Administrative Searches Must be Authorized by Either Written Regulations or a Warrant

Outside the context of criminal law enforcement, this Court frequently has held that searches may be conducted without a warrant. But this Court has consistently required that some other mechanism serve to eliminate the discretion of officers in the field who conduct such searches. In fact, outside the context of highly regulated industries,[10] this Court has never upheld a warrantless, suspicionless search conducted without written guidelines specifying who could be searched, when, and the scope of the search.

This Court summarized its jurisprudence in this area in **Donovan v.**

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10. **See United States v. Biswell, 406 U.S. 311 (1972); Colonnade Corp. v. United States, 397 U.S. 72 (1970).**

Dewey , 452 U.S. 594 (1981). In that case, this Court considered whether the standards set forth in a federal statute for inspection of mines provided "a constitutionally adequate substitute for a warrant." **Id.** at 603. In doing so, this Court contrasted two types of administrative inspection schemes. In the first, where the legislature or executive "has authorized inspection but made no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." **Id.** at 599. This is because such schemes "devolve[] almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search." **Id.** at 601. In such cases, this Court reasoned, "a warrant may be necessary to protect the [citizen] from the 'unbridled discretion

[of] executive and administrative officers.'" **Id.** at 599.

On the other hand, this Court explained in **Dewey**, "the assurance of regularity provided by a warrant may be unnecessary under certain [conditions]." 452 U.S. at 599. Under the Federal Mine Safety and Health Act at issue in **Dewey**, for example, "The discretion of Government officials to determine what facilities to search, [the frequency of inspections,] and what violations to search for is . . . directly curtailed by the regulatory scheme." **Id.** at 604, 605. "Under these circumstances," this Court concluded, "it is difficult to see what additional protection a warrant requirement would provide." **Id.** at 605.

Similar reasoning underlies this Court's contrasting reception of different forms of automobile stops designed to enforce both traffic and

immigration laws. In **Delaware v. Prouse**, 440 U.S. 648 (1979), this Court held that officers' discretionary, suspicionless stop of a car to check its driver's license and registration was unreasonable. "In those situations in which the balance of interests precludes insistence upon 'some quantum of individualized suspicion,'" this Court reasoned, "other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" **Id.** at 654-55. This Court held, "regulatory inspection unaccompanied by any quantum of individualized, articulable suspicion must be undertaken pursuant to previously specified 'neutral criteria.'" **Id.** at

662 (emphasis added).[11] **See also United States v. Brignoni-Ponce**, 422 U.S. 973 (1975) (holding stops by roving patrols near border unconstitutional). **Compare Michigan Department of State Police v. Sitz**, 496 U.S. 444 (1990) (upholding sobriety checks of all drivers at checkpoints selected pursuant to written guidelines); **United States v. Martinez-Fuerte**, 428 U.S. 543, 559 (1976) (upholding the stopping of all cars at fixed checkpoints near the border "not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective

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11. This holding was echoed in **Brown v. Texas**, 443 U.S. 47 (1979) (holding discretionary, suspicionless stop of individual to obtain identification unconstitutional). "[T]he Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." Id. at 51.

allocation of limited resources").

In the context of inventories of personal property incident to arrest, this Court has also relied on the existence of a policy authorizing the search to mark the boundary between reasonable and unreasonable searches. "[A]bsent such a policy," an inventory search is "not sufficiently regulated to satisfy the Fourth Amendment." **Florida v. Wells**, 495 U.S. 1, 5 (1990).

B. The Court of Appeals' Holding is Inconsistent with this Court's Holdings Concerning Drug Testing of Public Employees

This Court's two decisions concerning drug testing of public employees are fully consistent with Dewey and the other precedent described above. In each case, the government had promulgated detailed regulations specifying who could be tested, when, and for what. This Court reasoned that such

regulations were a substitute for a warrant because they both protected the privacy of employees by guaranteeing that testing would only take place under predefined circumstances and insured that testing would further a legitimate governmental interest.

In **Skinner**, this Court found that a warrant requirement would "do little" because "the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically in the regulations that authorize them, and doubtless are well known to covered employees." **Id.** at 622. The regulations rendered intervention of a magistrate unnecessary because there was only "minimal discretion vested in those charged with administering the program." **Id.** "In sum," this Court concluded, "imposing a warrant requirement . . .

would add little to the assurances of certainty and regularity already afforded by the regulation." **Id.** at 624. **See also Von Raab**, 489 U.S. at 667.

In contrast, in this case, the District's written regulations did not authorize the testing of Plaintiff at the completion of her training course. The decision to test was discretionary. The Court of Appeals found that the District had an unwritten practice of testing at this time. But an unwritten practice reflects the exercise of discretion, no matter the degree of regularity of its exercise. Moreover, an undocumented practice is not an effective substitute for a warrant. An unwritten practice cannot be consulted by an employee and it is not binding on an officer in the field. Particularly when it is inconsistent with a written policy, an unwritten practice neither serves to

assure an employee that an intrusion is authorized by law nor to constrain the discretion of officers in the field.

The Court of Appeals' holding that an unwritten practice may substitute for a warrant will also create complex factual questions concerning whether such a practice existed and legal questions concerning how consistent and longstanding a pattern of conduct must be to constitute a "practice." None of these questions arise if a written regulation or policy is required.

The Court of Appeals also held that the existence of written regulations governing the testing is simply one factor to be placed on the reasonableness balance. This holding undermines the function of such regulations as "a substitute" for a warrant. The warrant requirement provides a clear standard governing the constitutionality of

criminal searches. It removes the decision about the propriety of testing from the officer in the field. A requirement that routine administrative searches be pursuant to written regulations would serve the same purposes. Throwing the existence of such regulations into the mix of the balancing test as one more factor to be considered does not.

Review by this Court is necessary in order to establish that written regulations or policies specifying who can be tested, when,[12] and for what are an essential substitute for a warrant authorizing suspicionless drug testing of

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12. In order to serve the purposes discussed in **Skinner** and **Von Raab**, regulations need not specify the precise times when testing will occur or the specific individuals who will be tested. It is sufficient if they set forth the circumstances justifying testing, e.g., after major accidents as in **Skinner**, and a method of selecting employees that eliminates the discretion of field personnel, e.g. by lot.

public employees.[13]

CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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13. The two leading scholars of the fourth amendment have both urged this Court to encourage the promulgation of rules curtailing the discretion of field officers and to defer to high-level administrators' judgment that such rules are reasonable. See Wayne R. LaFave, Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication, 89 Mich. L. Rev. 446 (1990); Anthony G. Amsterdam, Perspective on the Fourth Amendment, 58 Minn. L. Rev. 349, 416-17 (1974).

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued
January 7, 1994

Decided
June 17, 1994

No. 92-7161

MARIA PIROGLU,
APPELLANT

v.

T.R. COLEMAN, INDIVIDUALLY AND AS FIRE CHIEF, DISTRICT OF COLUMBIA, ET AL.,
APPELLEES

Appeal from the United States
District Court for the
District of Columbia
(Civil Action No. 87-585)

Craig Becker argued the cause for the appellant. On brief were John C. Dempsey and Arthur B. Spitzer.

Michael A. Conley, Special Assistant Corporation Counsel, argued the cause for the appellees. On brief were John

Payton, Corporation Counsel, and Charles L. Reischel, Deputy Corporation Counsel.

BEFORE SILBERMAN, SENTELLE, and HENDERSON, Circuit Judges.

Opinion for the court filed by Circuit Judge Henderson.

KAREN LECRAFT HENDERSON, Circuit Judge: Maria Piroglu brought suit in district court against the District of Columbia, its then-Fire Chief T.R. Coleman, Fire Department Lead Inspector Roger Hooper and Police Sergeant Nora Coxeum (referred to collectively as the District), alleging violations of her fourth and fifth amendment rights. Specifically, Piroglu asserted that the mandatory urinalysis to which the District subjected her constituted an unreasonable search under the fourth amendment because: (1) Sergeant Coxeum visually observed as she produced her urine sample; and (2) the testing was

conducted in the absence of regulations limiting the District's discretion to order unannounced urinalysis. She further alleged that the District violated her fifth amendment right to due process when it terminated her employment on the basis of a positive drug test without providing her notice and an opportunity to be heard. Piroglu appeals the district court's grant of summary judgment to the District.

I.

Piroglu began her employment with the District on July 7, 1986, as an emergency medical technician (EMT) and was immediately enrolled in a four week mandatory training course. From the outset, the District notified Piroglu and her fellow EMT trainees that they would be tested for illegal drug use. Joint Appendix (J.A.) at 47, 61. The District did not, however, let the trainees know

when the testing was to take place. Near the end of the training course, EMT Training Instructor Roger Hooper informed the trainees that their drug tests were scheduled later that day. They were then taken as a group to the Police and Fire Clinic (the clinic) for the tests.

Once at the clinic, Piroglu was instructed to urinate into a bottle in the presence of Coxeum. It is unclear from the record before us the circumstances under which Piroglu provided her urine sample. Piroglu implies that Coxeum observed her urine as it passed from her body into the bottle. Piroglu's Brief at 5 ("Coxeum observed Plaintiff as she urinated into a bottle."). The District asserts that although Coxeum watched Piroglu continuously as Piroglu provided the sample, she did not actually watch Piroglu's urine pass into the specimen

bottle. J.A. at 107-08. At any rate, when Piroglu handed the filled specimen bottle to Coxeum, Coxeum observed that the sample felt cold. Believing that Piroglu had tampered with her sample, she called in another clinic employee and the two observed Piroglu as a second sample was produced.

The clinic tested Piroglu's second urine sample using the enzyme-multiplied immunoassay technique (EMIT). According to the record, EMIT is 95 to 96 per cent accurate in determining the presence of controlled substances in urine. J.A. at 94. Piroglu's sample tested positive for cocaine metabolites. The clinic then sent the specimen to CompuChem Laboratories, where it was tested again, this time using the gas chromatography/mass spectrometry (GC/MS) method. When used in combination with EMIT, the GC/MS method is 99.9 per cent

accurate. Id. The CompuChem test also yielded a positive result. Piroglu has never challenged the accuracy of the test results.

Piroglu was not permitted to complete the one-year probationary period required of EMT trainees because of her positive drug test results. On August 20, 1986, Chief Coleman notified Piroglu by letter that her employment was terminated for failure to complete successfully her probationary period. On March 4, 1987, Piroglu brought suit against the District alleging violations of her fourth and fifth amendment rights. Both Piroglu and the District moved for summary judgment. After the parties had briefed and argued their motions, the Supreme Court granted certiorari in two unrelated cases involving fourth amendment challenges to mandatory drug testing procedures. See Skinner v.

Railway Labor Executives' Ass'n, 489 U.S. 602 (1989), rev'g Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575 (9th Cir. 1988); National Treasury Employees' Union v. Von Raab, 489 U.S. 656 (1989), aff'g in part and vacating in part 816 F.2d 170 (5th Cir. 1987). The District moved to stay Piroglu's action pending the Supreme Court's disposition of the two cases. The district court granted the District's motion to stay over Piroglu's objection.

After the Supreme Court decided Skinner and Von Raab, the parties rebriefed their cross-motions for summary judgment. The district court then, for reasons not explained in the record, held the case under advisement for three years. During that time, we decided National Treasury Employees' Union v. Yeutter, 918 F.2d 968 (D.C. Cir. 1990). In Yeutter, we held that in the absence

of a particularized reasonable suspicion of tampering, an employer's visual observation of its employee's act of urination may render the employer's drug testing unreasonable under the fourth amendment. Id. at 975-77.

The district court granted the District's motion for summary judgment on April 29, 1992. Because the district court's order did not discuss Yeutter, Piroglu filed a motion requesting the court to reconsider the effect of Yeutter on her fourth amendment claims. On July 17, 1992, the district court denied Piroglu's motion for reconsideration.

II.

The District's collection of Piroglu's urine sample constitutes a search subject to the fourth amendment's requirement of reasonableness. See National Treasury Employees' Union v. Von Raab, 489 U.S. 656, 701 (1989); Skinner

v. Railway Labor Executives' Ass'n, 489 U.S. 602, 618 (1989). Piroglu argues that the District's collection of her urine sample was unreasonable because: (1) a District official observed her as she urinated without any reason to believe that she would tamper with her urine sample; and (2) the testing was an act of unbridled discretion. We address Piroglu's arguments in turn.

A.

In order to determine whether the District's visual observation of Piroglu as she provided her urine sample violated the fourth amendment, we must balance the District's interest in observation with the resulting intrusion on Piroglu's interest in privacy. National Treasury Employee's Union v. Yeutter, 918 F.2d 968, 975-76 (D.C. Cir. 1990). On the record before us, we are unable to perform the balancing test called for by

Yeutter. The record does not resolve the parties' dispute regarding whether Coxeum had Piroglu in plain sight as Piroglu urinated or whether she was merely present and observed Piroglu in some less intrusive way while the sample was provided. For example, the record does not foreclose the possibility that Piroglu was in a stall when she urinated and Coxeum merely observed her feet under the door.[1] Without conclusive evidence as to the precise circumstances of the urine collection, it is impossible for us to assess the degree to which the District may have invaded Piroglu's privacy. With Coxeum's vantage point (a critical point) in dispute, the district

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[1] The district court's Memorandum and Order is unclear on this issue. See J.A. at 179 ("The EMT candidates were allowed to void in private, observed only by a single superior of the same sex...."). If one is totally observed as he urinates, it can hardly be said that he is "allowed to void in private."

court erred in granting summary judgment to the District on Piroglu's claim that its visual observation rendered the testing procedure unreasonable under the fourth amendment. Accordingly, we remand to the district court so that it may resolve the issue based on a more thorough development of the factual record.

Nevertheless, we offer some guidance to the district court in its analysis of Piroglu's claim that the District's visual observation of her rendered the testing unconstitutional. In denying Piroglu's motion for rehearing the district court declined to consider our decision in Yeutter because the case "did not purport to operate retroactively to invalidate urine-testing of particular specimens acquired earlier." J.A. at 183-84. We disagree with the district court's analysis. We decided Yeutter in

November, 1990, well in advance of the district court's grant of summary judgment on April 29, 1992. Accordingly, the district court's decision not to apply Yeutter in a case pending at the time Yeutter was decided was incorrect. See Harper v. Virginia Dep't of Transp., 113 S.Ct. 2510, 2516 (1993) ("Nothing in the Constitution alters the fundamental rule of retrospective operation that has governed [j]udicial decisions...for near a thousand years.") (internal quotation omitted).

If the district court finds that Coxeum's observation of Piroglu as Piroglu urinated was unobstructed and complete and was without reasonable suspicion that she would tamper with her sample, the collection of Piroglu's first urine sample was unreasonable under the fourth amendment. See Yeutter, 918 F.2d at 975. If, on the other hand, the court

finds that Coxeum did not have Piroglu in plain sight as Piroglu urinated, the collection of Piroglu's first sample would be reasonable. After Coxeum observed that Piroglu's sample felt cool she would have had a reasonable suspicion that Piroglu had tampered with the sample and thus her observation of Piroglu as Piroglu provided the second sample would not violate the fourth amendment. Nevertheless, the district court would still have to address Piroglu's argument that visual observation by <u>two</u> clinic employees was unreasonable. Although we do not pass on the question whether the mere presence of two clinic employees would automatically render the testing unreasonable, the District should explain why it thought two observers were necessary.

Finally, we address the remedy available to Piroglu if the district

court finds that her testing was unreasonable. Piroglu seeks reinstatement and back pay as well as compensatory and punitive damages. See J.A. at 27. Even if the court determines that Coxeum's visual observation of Piroglu as Piroglu urinated was unreasonable, an award of reinstatement and back pay would be inappropriate. As noted earlier, Piroglu's first sample was never tested. Accordingly, any constitutional infirmity in the collection of the first sample in no way led to Piroglu's termination. If the court concludes that the collection of her second sample was similarly tainted, reinstatement and back pay would nevertheless be unavailable remedies because the constitutional violation did not cause Piroglu's discharge. See Carey v. Piphus, 436 U.S. 247, 254-59 (1978). The District terminated Piroglu's

employment because she tested positive for cocaine use irrespective of any constitutional infirmity in the collection process. Therefore, Piroglu's remedy would be one for damages only. See generally Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) ("[P]etitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the [Fourth] Amendment.").

B.

Piroglu also argues that the District's drug testing was unreasonable because it was an exercise of unbridled discretion. Specifically, Piroglu contends that because District regulations did not specify that she could be tested randomly, the District was required to obtain a warrant before

testing her.[2] As the Supreme Court has explained, an employer need not obtain a warrant before testing its employees "when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." See Skinner, 489 U.S. at 619. The District's testing of its EMT trainees serves as a special need wholly unrelated to law enforcement: it ensures that individuals charged with protecting

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[2] The District Fire Department regulations in effect at the time of Piroglu's test authorized drug testing when

> a member of the Department clearly exhibits erratic behavior consistent with intoxication, giving the on-duty platoon commander probable cause to believe that the man is under the influence of...drugs to the extent that his physical and mental facilities are affected and his judgment is impaired.

Fire Department Order Book art. 7, §7. Although the District argues that its substance abuse policy did allow random testing of its EMT trainees, it appears from the record that, at the time of Piroglu's test, the policy was not yet in effect. See J.A. at 72.

the public health and safety are not under the influence of drugs. To determine whether the District's special need in testing its EMT trainees renders the warrant requirement impracticable, we "balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements in the particular context." Id.

The District has a strong interest in testing its EMT trainees for drug use. Once the trainees become EMTs they are called upon to assess an emergency patient's symptoms, to administer cardiopulmonary resuscitation and to transport the emergency patient to a health care facility. See generally District of Columbia v. Howard, 588 A.2d 683 (D.C. 1991). Given the nature of his duties, an EMT under the influence of drugs poses a real and substantial risk

to public health and safety. The District's ability to protect the public through preventative drug screening of its EMT trainees would be greatly frustrated if it first had to obtain a warrant; a trainee who uses drugs could complete the training program without exhibiting symptoms of probable drug use only to become an EMT and pose a significant danger to the public safety. See Skinner, 489 U.S. at 631 ("A requirement of particularized suspicion of drug or alcohol use would seriously impede an employer's ability to obtain this information, despite its obvious importance.").

Balanced against the District's strong interest in testing trainees without a warrant, the invasion of Piroglu's privacy resulting from a warrantless drug test is relatively slight. Piroglu was informed at the

beginning of the probationary period that she would be tested for drug use at some point during her training. J.A. at 47. Although advance notice of drug testing does not automatically defeat an employee's argument that the testing is unconstitutional, it does decrease his expectation of privacy. See Willner v. Thornburgh, 928 F.2d 1185, 1189-90 (D.C. Cir.), cert. denied, 112 S.Ct. 669 (1991). Moreover, as part of its EMT training program, the District required all trainees to submit to physical examinations, including a drug test. See J.A. at 56. Piroglu herself had already been tested once before the challenged drug test took place. See id. On this record, Piroglu's privacy interest in being free from a warrantless drug test is insubstantial. Because the District's interest in randomly testing its trainees outweighs Piroglu's privacy interest, we

reject her argument that the fourth amendment required the District to obtain a warrant before testing her.

Piroglu next argues that the drug test was unreasonable because the district did not have regulations in place delimiting its discretion in testing its trainees. Specifically, Piroglu asserts that the decision to subject her to random drug testing was an exercise of unrestricted discretion on the part of EMT Training Instructor Hooper because no regulation authorized the testing of EMT trainees in the absence of individualized suspicion. Piroglu relies primarily on the Supreme Court's decision in Skinner. In that case, the Court's holding that the employer was not required to obtain a warrant before subjecting its employees to urinalysis was based, in part, on its conclusion that the warrant requirement

would "do little" to protect the employees' privacy because "[b]oth the circumstances justifying toxicology testing and the permissible limits of such intrusions are defined narrowly and specifically in the regulations that authorize them, and doubtless are well known to covered employees." Skinner, 489 U.S. at 622. Piroglu reads Skinner to establish an absolute requirement that employee urinalysis be conducted only pursuant to regulations. We disagree. The Court did not hold that urinalysis constitutes an unreasonable search if conducted in the absence of regulations. Rather, it held that, when weighing an employee's privacy interest against an employer's interest in random drug testing, the existence of specific authorizing regulations decreases the employee's privacy interest. Id. at 621-24.

The absence of regulations governing the District's testing of Piroglu does not alter our conclusion that the District's interest in testing its EMT trainees without a warrant outweighs Piroglu's privacy interest. Piroglu's privacy interest was not adversely affected by Hooper's decision to test her and her fellow EMT trainees as part of their training program -- as noted earlier, Piroglu and the other trainees were informed from the outset that they would be subject to drug testing during their training period. J.A. at 47, 61. A regulation expressly authorizing the drug testing of EMT trainees would not have provided Piroglu with notice she did not otherwise receive. The District apparently had in the past subjected all EMT trainees to unannounced drug testing at some time during their training. See J.A. at 72 ("Other classes of EMTs, which

preceded plaintiff's class, were uniformly tested for drug use immediately prior to their completion of training."). Indeed, Piroglu concedes that she had been told that she "might be subject to drug testing during her employment." Piroglu's Brief at 4.[3] Moreover, the District's uniform practice restricted its discretion to order drug testing. The practice authorized Hooper to order his EMT trainees to submit to unannounced drug testing; it would not, however, have authorized him to single Piroglu out in the absence of individualized suspicion and subject only to an unannounced test.

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[3] Prioglu claims that the District did not have a uniform practice of testing each of its EMT trainees. See Piroglu's Reply Brief at 1 n.1. She did not, however, produce any evidence that the District has permitted a trainee to graduate without passing a drug test. Piroglu's bare assertion that no drug testing practice existed is insufficient to create a genuine issue of material fact rendering summary judgment inappropriate. See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

Because Piroglu had noticed that she was subject to unannounced drug testing and because the District's uniform practice sufficiently delineated its authority, its testing of Piroglu was not unreasonable under the fourth amendment.

C.

Finally, Piroglu challenges the district court's grant of summary judgment on her fifth amendment claim, asserting that the District denied her due process when it terminated her employment without providing notice of the evidence against her and an opportunity to be heard. The legitimacy of Piroglu's argument turns on whether she had a property interest in continued employment. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985). To establish a property interest, Piroglu must show more than a unilateral expectation that her employment would not

be terminated. See Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Perry v. Sindermann, 408 U.S. 593, 602-03 (1972). She must show "a legitimate expectation, based on rules (statutes or regulations) or understandings (contracts, express or implied), that [s]he would continue in [her] job." Hall v. Ford, 856 F.2d 255, 265 (D.C. Cir. 1988).

Piroglu's status as a probationary employee is a large hurdle for her to clear in order to establish a property interest. Probationary employment is ordinarily considered employment at will. See Wheaton v. Webb-Petett, 931 F.2d 613, 619 (9th Cir. 1991) ("Typically, permanent and classified employees have been held to have property interests...while probationary and nonclassified employees have not."); Duke v. Landon, 701 F.2d 768 (9th Cir. 1983) (probationary employee had "no legitimate

claim of entitlement to continued employment") (internal quotation omitted); Ring v. Schlesinger, 502 F.2d 479, 486 (d.C. Cir. 1974) (probationary employee did not have "an expectancy of job retention requiring procedural protection under the due process clause."). As we have previously held, "[t]hose who are terminable at will have no property interest because there is no objective basis for believing that they will continue to be employed indefinitely." Hall v. Ford, 856 F.2d 255, 265 (D.C. Cir. 1988).

Piroglu relies on a District regulation relating to the separation of a probationer as the source of her entitlement to continued employment with the District. See J.A. at 115-16 (District Personnel Manual, Ch. 8, Subpart 6.3(H)(1)). The regulation provides that a probationary employee may

be terminated before completing his probationary period if he "fails to demonstrate that he...possesses the skill and character traits necessary for satisfactory performance." Id. Piroglu argues that the regulation entitles her to continued employment by restricting the circumstances under which the District can terminate her employment. The district court disagreed, interpreting the regulation to provide for "the discretionary and unreviewable termination of probationary employees during the probationary period." J.A. at 181. We agree with the district court.

Although Piroglu asserts that under the regulation the District can terminate her employment only if it determines that she lacks necessary skill and character traits, the word "only" does not appear in the regulation's text. The regulation merely sets out certain circumstances in

which a probationary employee may be terminated; it does not limit the District's discretionary right to otherwise terminate him. But see Lewis v. Hayes, 505 N.E.2d 408, 411 (Ill.App.Ct. 1987) ("The defendants argue that because [the regulation] does not contain the word 'only' that it is just an additional way to discharge a probationary employee. We would only say that to accept the defendants' interpretation of its rule would render it meaningless."). Our interpretation is supported by D.C. Code §1-617.1, which provides that a permanent employee "who is not serving a probationary period" may be terminated only for cause. Section 1-617.1 manifests that a probationary

employee enjoys no entitlement to continued employment.[4]

Piroglu's reliance on decisions from other jurisdictions holding that a probationary employee can have a property interest in continued employment is misplaced. See, e.g., Lee v. Western Reserve Psychiatric Habilitation Ctr., 747 F.2d 1062, 1067 (6th Cir. 1984); Perri v. Aytch, 724 F.2d 362, 365 (3d Cir. 1983). In both Lee and Perri, the regulations at issue restricted the agencies' discretion by providing that probationary employees could be terminated only in certain circumstances.

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[4] Piroglu's reliance on the Fire Department rules is similarly unavailing. They provide, in relevant part, that "service of a probationer may be terminated by the Commissioner at any time during such year for misconduct, inefficiency, or unfitness." Rules and Regulations of the Fire Department of the District of Columbia art. XII, pt. A, §3 (reprinted in J.A. at 132). Again, we find the District's discretion to terminate a probationary employee unaffected by the Fire Department rule.

See Lee, 747 F.2d at 1067 ("The defendants concede, however, that the plaintiff had a property interest in his employment under [the regulation], which provides that an employee in the classified service cannot be removed except for the reasons stated therein."); Perri, 724 F.2d at 365 ("Although probationary employment is commonly at the will of the employer, in this instance the regulations...specifically provided that dismissal during the probationary period shall be 'for just cause only.'"). These cases are not persuasive because the District's regulations do not contain similar words of exclusivity. Because Piroglu had no property right in continued employment, we affirm the district court's grant of summary judgment to the District on Piroglu's fifth amendment claim.

For the foregoing reasons, we reverse the district court's grant of summary judgment on Piroglu's claim that the District's visual observation of her rendered her drug test unreasonable under the fourth amendment and remand so that the district court may determine the precise circumstances of Piroglu's drug test. We urge the district court to decide the matter with dispatch in light of the fact that Piroglu's complaint has been pending since 1987 -- over six years. We affirm the district court in all other respects.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARIA PIROGLU,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 87-0585
T.R. COLEMAN, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

The plaintiff Maria Piroglu challenges her dismissal from the Emergency Medical Technician ("EMT") training program of the District of Columbia Fire Department after testing positive by urinalysis for cocaine use. Plaintiff alleges her involuntary termination violated her rights under the Fourth and Fifth Amendments to the United States Constitution.

The record establishes that Ms. Piroglu was hired as a probationary Fire Department employee and enrolled in the

EMT training program on July 7, 1986. Shortly before the conclusion of the four-week training course plaintiff and her classmates were transported to the Police and Fire Clinic for urinalysis drug testing. The EMT candidates were allowed to void in private, observed by only a single superior of the same sex, and only evidence of recent illegal drug usage was looked for in the specimens examined. After screening with the enzyme-multiplied immunoassay technique ("EMIT") Ms. Piroglu's urine reportedly tested positive for cocaine metabolites. Plaintiff then provided a second urine sample which was again subjected to the EMIT test and again registered positive for cocaine. Yet another specimen, examined by the more accurate gas chromatography/mass spectrometry test, gave a third positive reading indicating cocaine use. Defendants then advised Ms.

Piroglu of the positive test results and suspended her from the program. On August 22, 1986, they terminated plaintiff's probationary employment.

It appearing that no material issues of fact stand as an impediment, the action is ripe for resolution on the pending cross-motions for summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

Plaintiff's first claim is that the drug testing to which she was subjected was an unreasonable search and seizure, and thus, a violation of her Fourth Amendment rights. The claim is, however, foreclosed by the Supreme Court's rulings in National Treasury Employees Union et al. v. Von Raab, 489 U.S. 656 (1989), and Skinner v. Railway Labor Executives' Assn., 489 U.S. 602 (1989). Those cases held that compulsory urinalysis as a condition to employment for indications

of illegal drug usage may constitutionally be required of those whose jobs may affect public safety or present opportunities for compromise of official integrity. The District of Columbia certainly has both concerns in mind in its desire to assure that its EMTs are drug-abstinent.

Plaintiff's principal Fifth Amendment claim is predicated upon what she perceives as the deprivation of a "property" right in continued employment without due process in her summary termination as an EMT candidate. She was, however, only a probationary employee of the Fire Department at the time. Probationary employees do not enjoy the "entitlement" to their positions, as do permanent employees whose status is subject to constitutional protection. See Beeson v. Hudson, 630 F.2d 622, 626 (8th Cir. 1980); Duke v.

Langdon, 701 F.2d 768 (9th Cir. 1983); Gemmel v. F.A.A., 558 F.Supp. 918 (D.D.C. 1982). Cf. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). The personnel regulations of the Fire Department plainly provide for the discretionary and unreviewable termination of probationary employees during the probationary period. See District of Columbia Personnel Manual, Chapter 8, Subpart 6.3.H. Thus, even had Ms. Piroglu been denied a proper hearing, or other opportunity to dispel the suspicions raised by her positive urinalysis, as she claims, she had no right to expect such formalities then or to demand them now.

As to Ms. Piroglu's suggestion that she has been deprived of a Fifth Amendment "liberty" in the form of the damage done her reputation by her dismissal, the record contains no evidence of the defendants' public

disclosure of the reason for her termination.[1] As the Supreme Court has held in Bishop v. Wood, 426 U.S. 341 (1979), there must be publication for a claim of damage to reputation amounting to a deprivation of constitutionally protected "liberty" to lie. See also, Roth, 408 U.S. at 574, n.13.

For the foregoing reasons, it is, therefore, this 29th day of April, 1992

ORDERED, that the plaintiff's motion for summary judgment is denied; and it is

FURTHER ORDERED, that the defendants' motion for summary judgment is granted, and the action is dismissed with prejudice.

Thomas Penfield Jackson
U.S. District Judge

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[1] Indeed, District of Columbia personnel regulations forbid publication of the termination rationale for a probationary employee. District of Columbia Personnel Manual, Chapter 8, Subpart 6.3.H.3.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARIA PIROGLU,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 87-585
T.R. COLEMAN, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

Plaintiff Piroglu has moved for reconsideration of the Court's Memorandum and Order of April 29, 1992, dismissing her complaint on the ground that the Court failed to consider a controlling case, National Treasury Employees Union v. Yeutter, 918 F.2d 968 (D.C. Cir. 1990), holding, among other things, that visual observation of the act of urination may be an unreasonably intrusive requirement of an otherwise constitutionally permissible drug testing

regime. 918 F.2d at 975-6. Since plaintiff was observed while she voided the urine samples that proved her undoing in this case, she argues that the Court's decision is contrary to the law of the Circuit and must therefore be vacated. The Court disagrees.

NTEU v. Yeutter was decided in November, 1990, in the context of an action to enjoin prospectively a proposed drug testing program for an entire Executive Branch department of the federal government. It did not purport to operate retroactively to invalidate urine-testing of particular specimens acquired earlier (as Ms. Piroglu's were in August, 1986) while the subject was under visual observation by an inspector or supervisor. Nor did the case purport to establish an "exclusionary rule" prohibiting the use of positive test results in employment decisions adverse

to the tested employee. Finally, the case does expressly admit of the propriety of visual observation of the act of urination when (as was the case with Ms. Piroglu) an "individualized determination" has been made that cheating can be anticipated. Id. at 977.

Assuming, without deciding, that NTEU V. Yeutter would preclude the District of Columbia Fire Department's drug testing program as it was conducted in 1986 if it were in use today, it does not follow that it requires the reinstatement of a probationary employee dismissed in 1986. At most, it might entitle her damages for an invasion of her privacy, relief that she has not sought here.

For the foregoing reasons, it is, this 17th day of July, 1992,

ORDERED, that plaintiff's motion for reconsideration is denied.

Thomas Penfield Jackson
U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-7161 September Term, 1993

Filed AUG 03 1994
RON GARVIN
CLERK

Maria Piroglu,

Appellant,

v.

T.R. Coleman, individually and as Fire Chief, District of Columbia, et al.,

Appellees.

BEFORE: Silberman, Sentelle and Hendersen, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing, filed June 30, 1994, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY:

Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-7161 September Term, 1993

Filed AUG 03 1994
RON GARVIN
CLERK

Maria Piroglu,

Appellant,

v.

T.R. Coleman, individually and as Fire Chief, District of Columbia, et al.,

Appellees.

BEFORE: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph and Rodgers, Circuit Judges

ORDER

Appellant's Suggestion for Rehearing In Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court in banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY:
Robert A. Bonner
Deputy Clerk

Supreme Court, U.S.
FILED
JAN 30 1995
OFFICE OF THE CLERK

No. 94-807

In the Supreme Court of the United States

OCTOBER TERM, 1994

MARIA PIROGLU,
Petitioner,

v.

T.R. COLEMAN, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

PARTIES TO THE PROCEEDING

T.R. Coleman, who was sued in his official and individual capacities has been replaced as fire chief of the District of Columbia by Otis J. Latin, Sr.

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 94-807
OCTOBER TERM, 1994

MARIA PIROGLU,
Petitioner,

v.

T.R. COLEMAN, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. Petitioner, Maria Piroglu, a former District of Columbia probationary employee, was discharged forty-six days after being hired as an ambulance attendant because a urine test administered to her was positive for cocaine use. The mandatory urine test was part of the initial training program for probationary Emergency Medical Technicians ("EMTs").[1/]

[1/] EMTs are fire department personnel who travel by ambulance in response to calls for emergency medical care. Their functions include making preliminary assessments of patient symptoms; providing cardiopulmonary resuscitation and other basic life support services; giving initial medical care; and transporting patients to medical facilities. *See District of Columbia v. Howard*, 588 A.2d 683 (D.C. 1991); *Hines v. District of Columbia*, 580 A.2d 133 (D.C. 1990).

Ms. Piroglu claims that the District of Columbia violated her Fourth Amendment right to be free of unreasonable searches because, although all members of the training class had been tested and all had been warned that testing would occur, the fire department had promulgated no regulations governing drug testing of probationary employees.

Ms. Piroglu was an EMT trainee during July and August 1986. After being hired by the District of Columbia on July 7, she was enrolled in a four-week training course. J.A. 9, 17.[2/] As part of the hiring process, Ms. Piroglu's urine had been tested before her appointment as a probationary EMT. J.A. 59.

During the training course, she and her classmates were informed that they would be tested for illegal drug use. J.A. 47. At the time, all EMT trainees were being tested for illegal drug use before graduation from the training academy. J.A. 47, 72. The testing was a mandatory component of the initial screening of EMT candidates. J.A. 72.

On August 1 the chief training instructor informed the training class (including Ms. Piroglu) that they would be tested that day for illegal drug use. J.A. 47-48, 61. The trainees were taken as a group to the Police and Fire Clinic, where they provided urine samples. J.A. 48.

Ms. Piroglu produced a urine sample in the presence of a female police sergeant. J.A. 58. There is an unresolved factual dispute whether the sergeant watched Ms. Piroglu urinate into the sample bottle. J.A. 108. What is clear is that the sergeant suspected possible tampering, apparently because the sample felt cold. J.A. 38. She informed the chief training instructor who directed her to obtain another urine sample from Ms. Piroglu. J.A. 109. Ms. Piroglu provided the sec-

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[2/] "J.A." refers to the joint appendix prepared for the court of appeals.

ond sample while the sergeant and another female officer watched. *Id.*

Laboratory examinations of the second urine sample yielded positive results for cocaine use. J.A. 59.

On August 22, the fire chief, the EMTs' highest level supervisor, notified Ms. Piroglu in writing that she would be fired that day for failure to complete her one-year probationary period satisfactorily. J.A. 63.

2. Ms. Piroglu brought suit in federal district court against the fire chief, the lead training instructor, the two test observers, and the District of Columbia, claiming violations of the Fourth and Fifth Amendments. J.A. 21-28. The Fifth Amendment claim is not at issue in this Court.

On cross-motions for summary judgment, the district court entered judgment for the defendants. A. 32A-41A.[3/] Relying on *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), the court held that compulsory urinalysis of government employees is constitutional when their jobs affect public safety or present opportunities for compromise of official integrity. A. 34A-35A. The court concluded that both concerns are implicated in ambulance attendant positions. A. 35A. The court also concluded that intervening circuit law, holding that visual observation of the act of urination is unreasonably intrusive, should not be applied retroactively. A. 38A-40A. If the circuit precedent were applicable, Ms. Piroglu might be entitled to damages for invasion of privacy, a remedy she had not sought, but would not be entitled to reinstatement. A. 40A.

3. The court of appeals affirmed the holding that giving the urine test to EMT trainees did not violate the Fourth Amendment but remanded for factual development to deter-

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[3/] "A." refers to the appendix to the petition for certiorari.

mine whether the administration of the test to Ms. Piroglu had been unduly intrusive. A. 15A-24A.

a. The court held that the District of Columbia had a strong governmental interest in testing probationary EMTs for drug use. Without warrantless drug testing, a trainee drug-user could complete the training program, become an EMT, and present "a significant danger to the public safety" in life-threatening situations. A. 17A-18A. In contrast to the government's interest, the invasion of privacy had been relatively slight: Ms. Piroglu (together with other members of the class) had been warned that a drug test would be administered and a medical examination, including drug testing, had been part of the training program. A. 19A.

The court of appeals rejected the contention that, under *Skinner*, drug tests are unreasonable searches unless authorized by regulations. The court read *Skinner* as holding that the regulations decrease the expectation of privacy, not that they are a *sine qua non* to constitutional drug testing. A. 21A. Here, a regulation would not have provided Ms. Piroglu more notice than she had been given. A. 22A. In addition, the testing had been universal, in accordance with past practice. A. 22A-23A & n. 3.

The court also held that, given the uniform practice of testing all EMT trainees and the notice that the trainees had received, regulations would have provided Ms. Piroglu no additional protection, at least none that is constitutionally required. A. 22A-23A.

b. The court of appeals could not determine from the record on summary judgment whether Ms. Piroglu had been watched by the attending sergeant during urination of the first sample; if she had been, that would be an undue invasion of privacy under circuit precedent.[4/] A. 9A-10A. The court

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[4/] *National Treasury Employees Union v. Yeutter*, 287 U.S. App. D.C. 28,

(continued...)

remanded for factual development. A. 10A. For the same reason, the court of appeals could also not determine, from the existing record, whether direct observation by two employees during the second urination was reasonable. A. 13A. It remanded that question to the district court as well. *Id.*

The court wrote that if, on remand, the district court were to find that Ms. Piroglu had been watched without reasonable suspicion of test tampering, the scrutiny would have been unreasonable. Ms. Piroglu would not be entitled to reinstatement and backpay because the first sample had not been tested and had not led to termination, but she would be entitled to damages for the invasion of privacy. A. 13A-15A. The presence of an additional observer during the second urination also would not entitle Ms. Piroglu to reinstatement or backpay because the method of observation had not caused the firing: "The District terminated Piroglu's employment because she tested positive for cocaine use irrespective of any constitutional infirmity in the collection process." A. 14A-15A, *citing Carey v. Piphus*, 435 U.S. 247 (1978), and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

REASONS FOR DENYING THE WRIT

There is no need for further review of either question presented by the petition.

The court of appeals' holding--that regulations are not essential before drug tests can constitutionally be administered to probationary trainees if all trainees are tested and all have been notified that testing would be conducted during their training--conflicts with no holding by this Court or by any

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[4/] (...continued)

918 F.2d 968 (1990).

federal or state appellate court. It presents no issue of constitutional magnitude necessitating this Court's attention.

The court of appeals' direction to the trial court that, if either administration of the urine test was unnecessarily intrusive, Ms. Piroglu would be entitled to damages but not to reinstatement or backpay, remains contingent on the district court's factual findings on remand. It is consistent with this Court's holdings that a remedy should be tailored to the constitutional violation.

As a matter of logic, we discuss violation before remedy, the reverse order in which the questions are presented in the petition.

1. The Fourth Amendment is a shield only against *un*reasonable searches and seizures. Under *Skinner* and *Von Raab,* drug testing is not unreasonable if the risk to society of having employees--much less probationary trainees--perform their functions under the influence of drugs outweighs the intrusion into the employees' reasonable expectations of privacy. The governmental interest in testing is compelling when employees "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Skinner*, 489 U.S. at 628. The petition does not argue that the District of Columbia's interest in testing probationary EMTs, whose duties often make the difference between life and death, is less than compelling.

The Court has never held that a drug test (or other random search) is unreasonable simply because the government has not issued regulations governing testing. Rather, the Court has held that "[w]hat is reasonable * * * 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.'" *Id.*, at 619, *quoting United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985).

While *Skinner* and *Von Raab* involved testing based on legislation or written directives, the Court's focus was not on the legislation or directives as such but on the extent to which

the tests in fact intruded on employee privacy. The Court concluded that drug tests are not unreasonable searches when the testing is "well known to the covered employees" and the testing is "automatic" for all applicants to a covered position; under those circumstances there are few discretionary decisions to be made by rank-and-file personnel. *Von Raab*, 489 U.S. at 667; *Skinner*, 489 U.S. at 622; *see also, United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976)(holding routine police checkpoints to be constitutional despite apparent absence of governing regulations, in part because supervisory personnel choosing checkpoint locations were unlikely to act "arbitrarily or oppressively").

The reason for limiting rank-and-file discretion is to prevent arbitrary action and to give fair warning of a diminished expectation of privacy. A drug-testing program is not unreasonable when all members of a class of employees are tested, so that no individual member of the class is subject to discriminatory treatment, and when all have been notified in advance that they will be tested. *See Von Raab*, 489 U.S. at 672 n. 2 (noting unlikeliness of arbitrary and oppressive interference with privacy when a testing program applies to a clearly defined group of employees who receive advance notice that they will be tested). A testing program that limits discretion as to whom to test, what test is to be given, and, in a general way, when testing will occur--all matters made known to the prospective test-takers--is not unreasonable simply because it has not been dictated by written guidelines.

In the present case, the discretion of rank-and-file personnel was substantially bridled. The record discloses, and the court of appeals held, that all of the trainee class had been given early notice and all members of the class had been tested (as had been all members of previous trainee classes). Regulations would not have yielded more notice or provided greater protection against discriminatory treatment. To be sure, some discretion was exercised (by supervisory person-

nel, it should be noted) as to when the test would be given during the training period but the Court has recognized that testing programs that allow supervisors to exercise some judgment do not thereby permit "unbridled discretion." *Skinner*, 489 U.S. at 622 n. 6.

There is no need for further review of the second question presented by the petition for review.

2. The petition's other challenge--to the court of appeals' holding that remedy must be tailored to violation--also does not warrant this Court's attention.

Remedy is, of course, contingent on a finding of liability; in the present case there is no such finding and there may never be one. On remand, the district court may find that Ms. Piroglu had not been watched when she urinated the first time and that having two observers--one a corroborating witness--for the second test was not unreasonable. If so, there will be no remedy because there has been no constitutional violation.

This Court generally refuses to review decisions that are contingent on the outcome of further proceedings in the lower courts. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostock RR. Co.*, 389 U.S. 327, 328 (1967); *Virginia Military Institute v. United States*, 61 U.S.L.W. 3787 (1993)(Scalia, J., concurring).

In any event, the court of appeals' direction to the district court concerning remedy is consistent with this Court's jurisprudence. Remedy must be commensurate with the constitutional violation. *Memphis Community School District v. Stachura*, 477 U.S. 299, 306-307 (1986)(damages are "*compensatory*," in the sense that they are based on plaintiff's "actual losses"; italics in original); *id.* at 315 ("award must be proportional to the actual loss sustained")(Marshall, J., concurring). In addition, in order to receive damages at all, a plaintiff must first prove that there is a causal relationship between the constitutional violation and actual, compensable injury. *Carey v.*

Piphus, 435 U.S. at 260; *see also, Bivens v. Six Unknown Named Agents, supra*, 403 U.S. at 395-397 (plaintiff is entitled to recover for injuries suffered "as a result" of the Fourth Amendment violation). Causation is ordinarily determined according to common law tort principles. *Stachura*, 477 U.S. at 306.

Here, there is no causal relationship between the actions of the alleged attending witnesses and Ms. Piroglu's discharge. The urine testing program was constitutional for reasons stated in section 1, above. The first urine sample provided by Ms. Piroglu was suspect and therefore not used. It was cold to the touch, whether or not the police sergeant watched the act of urination. Because there was a reasonable suspicion that the test had been tampered with, Ms. Piroglu was required to provide a second sample, this time under direct observation by two witnesses. Even if the second observer's presence were to be deemed excessive by the trial court, her attendance had no bearing on the result of the second test. The sample would not have been different had the second witness been absent. In other words, neither the first direct observation--if it occurred--nor the presence of the second witness was a proximate, or even a "but for," cause of the discharge. The observations, while perhaps unreasonable, were entirely separable from the test; they did not cause the test to be administered a second time and did not result in the discovery of the incriminating evidence. *Cf. Murray v. United States*, 487 U.S. 533 (1988)(in criminal cases, evidence acquired through illegal searches need not be suppressed when also obtained from legal "independent sources"). In short, while the witnesses' scrutiny could possibly justify an award of damages against the District of Columbia for *their* excessive invasions of privacy, their actions did not contribute to, much less cause, the discharge.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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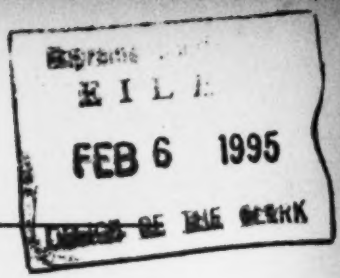

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

MARIA PIROGLU,

PETITIONER,

v.

T.R.COLEMAN, ET AL.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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STATUTES

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Petitioner Maria Piroglu has petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

ARGUMENT

Petitioner submits this reply brief: (1) to correct Respondent's repeated misstatement of fact -- that Piroglu was searched pursuant to a "drug-testing program," (2) to make clear that there was no "independent source" of the evidence upon which Piroglu's termination was based, and (3) to demonstrate that this Court has authority and should exercise its authority to review this case despite the fact that it was remanded to the District Court for further proceedings.

I. THE SEARCH WAS AN ACT OF UNBRIDLED DISCRETION

Respondents repeatedly misstate a critical fact by suggesting that the urinalysis in this case was part of a "drug-testing program." Brief in Opposition at 7. In fact, the testing was not part of anything that can accurately be characterized as a "program." To the contrary, the written drug-testing policy in place at the time of the testing did not provide for the testing at issue. 16A n.2. Moreover, not only did the testing at issue lack any written authorization, no high-level management official verbally advised supervisors, such as Defendant Lead Inspector Hooper, which employees could be tested or when testing could take place.

Respondents admit that "some discretion was exercised (by supervisory

personnel . . .) as to when the test would be given." Brief in Opposition at 7-8. But, in fact, first level supervisors exercised unbridled discretion over whether to test, when to test, and whom to test. Respondents point to the fact that these supervisors had consistently tested all trainees. But the degree of consistency with which discretion is exercised is beside the point. In the absence of a warrant, written regulations are needed to eliminate discretion and thereby insure that it cannot be abused.

This case clearly presents this Court with the question of whether a first level supervisor's compulsion of a public employee's urination for testing is unreasonable in the absence of either a warrant or of written regulations and/or policies that eliminate discretion over whom to test, when to test, and for

what to test.

II. THE UNCONSTITUTIONAL SEARCH WAS THE SOLE SOURCE OF THE EVIDENCE UPON WHICH PIROGLU'S TERMINATION WAS BASED

By citation to this Court's decision in **Murray v. United States**, 487 U.S. 533 (1988), Respondents suggest that there was an "independent source" of the evidence that formed the sole basis of Piroglu's termination. But there was not.

In **Murray**, this Court considered whether the "independent source" doctrine applied "only to evidence obtained for the first time during an independent lawful search" or also to "evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently." 487 U.S. at 537. This Court held that the doctrine applies in both these situations. But in this case, the

evidence was not independently obtained before or after the illegal search, only during the illegal search.

Respondents are thus not actually relying on this Court's "independent source" doctrine, but rather on a novel extension of that doctrine. Respondents do not argue that the evidence was discovered independently by lawful means; they simply content that it could have been. Respondents state, "The sample would not have been different had the second witness been absent." Brief in Opposition at 9. The criminal corollary of this argument is that evidence seized during a warrantless search should be admitted if it would have been discovered even if the police had obtained a warrant. Just as the absence of a warrant may render a search unconstitutional, the presence of the observers rendered the search in this

case unconstitutional; and the unconstitutional search was the sole source of the evidence upon which the termination was based. The unconstitutional search was thus both the "but for" and proximate cause of the discharge.

Respondents, in fact, do not contest the fact that the unconstitutional search caused Piroglu's discharge. Rather, they assert that this Court has adopted some notion of commensurability to deny plaintiffs compensation for all injuries caused by a violation of the Constitution. But even the cases cited by Respondents use the terms "compensatory" and "causation" not "commensurate." Brief in Opposition at 8-9. This Court has never authorized lower courts to weigh violations of the Constitution against the damage they cause and deny complete relief based on

some notion of commensurability not rooted in the principal of causation.

This case clearly presents this Court with the question of whether a public employer's unconstitutional search of a public employee, which yields the sole grounds for the employee's termination, is the cause of the termination for purposes of awarding damages.

III. THIS COURT HAS AUTHORITY TO REVIEW THIS CASE

Respondents suggest that this Court should not review the causation question because the Court of Appeals remanded the case to the District Court for a trial on liability. But this Court clearly has authority to review this case and should use its authority.

28 U.S.C. section 1254(1) grants this Court plenary authority to review cases in the courts of appeal "before or

after rendition of judgment or decree." It is not unusual for this Court to review questions resolved by a court of appeals in the course of a decision remanding a case for trial. **See, e.g., Blue Chip Stamps v. Manor Drug Stores**, 421 U.S. 723, 727 (1975); **Land v. Dollar**, 330 U.S. 731, 734 n.2 (1947).

In fact, this Court has on several occasions granted review to decide questions, like that at issue in this case, concerning the categories of damages that may be recovered after a trial that had not yet been conducted. In **Gillespie v. United States Steel Corp.**, 379 U.S. 148 (1964), this Court reviewed a decision of a court of appeals, in an interlocutory appeal, affirming a district court's pretrial decision to strike a wife's claims under the Jones Act to damages on behalf of her deceased husband's siblings. **Id.** at 153.

Similarly, in **United States v. General Motors Corp.**, 323 U.S. 373 (1945), this Court reviewed a decision reversing a district court's ruling that excluded all evidence of damages resulting from the taking of private property other than evidence of the value of the property itself. **Id.** at 367. In each case, this Court based its ruling on the importance of the question raised and the fact that it was "fundamental to the further conduct of the case." **Gillespie**, 379 U.S. at 153.

This Court should similarly use its plenary authority in this case because of the far-reaching importance of the question raised, the fundamental effect an answer will have on the further conduct of this case, and the procedural difficulties that Piroglu will face in bringing the question back before this Court if it declines review at this time.

If this Court declines review, this case will be remanded to the District Court. If Piroglu prevails on the issue of liability, she will be awarded damages only for the pain and suffering resulting from the unconstitutional search. In order to again ask this Court to review the question of whether the search was the cause of her termination, she will have to return to the Court of Appeals. But in order to do this, she will have to seek review of a question on which the Court has already ruled. Piroglu should not be forced to file what might be characterized as a frivolous appeal in order to obtain review in this Court. This Court should use its plenary authority to review both of the important questions raised by this case at this time.

CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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